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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
REEXAMINATION OF THE POLICY STATEMENT	)	GC Docket No. 92-52
ON COMPARATIVE BROADCAST HEARINGS	)	RM-7739
	)	RM-7740
	)	RM-7741

To: The Commission

Reply Comments
Of Greater Greenwood

GREATER GREENWOOD BROADCASTING LIMITED PARTNERSHIP ("Greater Greenwood"), pursuant to Section 1.415(c) of the Commission's Rules, 47 C.F.R. § 1.415(c), hereby submits its reply comments in response to the Commission's Notice of Proposed Rulemaking in GC Docket No. 92-52, 8 FCC Rcd 5475 (1993), and the comments addressed thereto.[1/]

1. Greater Greenwood is construction permittee of FM station WGGR(FM), Greenwood, Indiana. Greater Greenwood received the permit for WGGR through a comparative hearing. *See*, Sanders Broadcasting Limited Partnership, 5 FCC Rcd 5671 (Admin. L. J. 1990). Although Greater Greenwood has not yet completed construction of the station, it shortly expects to do so and begin operation pursuant to program test authority. Greater Greenwood would be negatively affected by the retroactive imposition of any holding period of longer than 1 year.

1/ Greater Greenwood's Reply Comments are timely filed. *See*, Order, DA 93-1064, released September 1, 1993.

Retroactive Application Of Holding Periods Would Be Arbitrary and Capricious And Not Withstand Judicial Review.

2. Greater Greenwood opposes the retroactive application of any three-year (or other mandatory holding period) adopted by the Commission as a result of this rulemaking and supports the comments of parties who have opposed such retroactive action. Among others, New Miami Latino Broadcasting Corporation ("New Miami Latino"); Rex Broadcasting Corporation; Susan M. Bechtel ("Bechtel"); the Federal Communications Bar Association ("FCBA"); August Communications, Inc. and John W. Barger; and Reed, Smith, Shaw & McClay ("Reed") correctly have noted the harm to be done by retroactive application of any newly-adopted holding period.

3. Retroactivity in formal rulemaking proceedings is inherently suspect. Bowen v. Georgetown University Hospital, 488 U.S. 203 (1988). Nothing in either the Communications Act or the Administrative Procedure Act would support a retroactive application of any required holding period on existing broadcast station applicants, licensees and permittees. Such specific statutory authority would be required for there to be a retroactive application of any holding period.[2/] As the Supreme Court noted in

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2/ In Maxcell Telecom Plus, Inc. v. F.C.C., 815 F.2d 1551 (D.C. Cir. 1987), which was decided before Bowen, the D.C. Circuit was able to discern sufficient Congressional intent in the adoption of the lottery statute, 47 U.S.C. § 309(i), to justify retroactive imposition of the lottery procedures for selection of cellular telephone applicants that had originally been filed in anticipation of comparative hearings. 815 F.2d at 1555. This is a limited exception because of the specific Congressional intent to employ lottery procedures to eliminate application backlogs, *inter alia*.

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Bowen:

> It is axiomatic than an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.

Id., at 208. As Bechtel has correctly noted (Comments, p. 1), there is no specific authority, either in Section 303(r) of the Act, 47 U.S.C. § 303(r), governing rulemaking powers, nor in the broadcast licensing provisions, Sections 307-309, 47 U.S.C. §§ 307-309, to justify the retroactive imposition of holding periods to existing licenses and permits obtained through the comparative hearing process.

4. Further, such retroactive application of rules is specifically prohibited by the Administrative Procedure Act, as noted by New Miami Latino (p. 3) and Bechtel (p. 2). The APA specifically defines a "rule" as an agency statement "of general or particular applicability *and future effect*." 5 U.S.C. § 551(4) (emphasis supplied). *See also* Bowen, supra, 488 U.S. at 218 (J. Scalia Concurring). Such retroactive application of any holding period to existing permittees and licensed stations when the rule is adopted would amount to what Justice Scalia characterized as "secondary retroactivity", *i.e.*, "altering future regulation in a

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2/ (...continued)
Id. Moreover, there was no imposition of any obligation or liability nor the deprivation of any rights as a result of the change from comparative hearing to lottery selection procedures. By contrast, such an obligation might cause substantial financial hardship to existing licensees and permittees. Reed's Comments (pp. 9-11) in particular set forth examples of the hardship that could be caused by retroactive application and enforcement of any holding period.

manner that makes worthless substantial past investment incurred in reliance upon the prior rule..." Id., 488 U.S. at 220 (J. Scalia Concurring). Although in this case, retroactive application of a holding period to existing permittees and licensed stations might not render an investment "worthless," it would still impose retroactively a substantial regulatory burden, with attendant financial costs, upon parties who had made financial decisions in reliance upon rules and policies then in effect. Such retroactivity is prohibited by the APA.

Conclusion

5. If the Commission ultimately chooses to adopt a mandatory holding period longer than 1 year for authorizations obtained through the comparative process, such a modified holding period should be limited to two years, as proposed by FCBA. A license-term holding period, as proposed by Black Citizens for a Fair Media, *et al.*, is unrealistic and would substantially harm the public interest.[3/]

3/ BCFM's analysis of supposed instability in broadcasting, particularly such instability's having been caused by "trafficking" in station licensees, results from a tunnel-visioned view of the market as inherently bad. BCFM's solution is a holding period that would last for the length of a license term. The Commission should reject the BCFM proposal.

BCFM sees the license term holding period as a solution to what it considers industry "instability." BCFM overlooks the negative effect on the value of radio broadcasting stations caused by the 600+ new allocations of stations in the 1980s, including many in major cities and immediately surrounding areas, from which many BCFM members benefitted (through outright license grants or settlements) because of the Commission's progressive licensing

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6. However, whatever additional holding period is ultimately adopted should *not* be applied retroactively.

Respectfully submitted,

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[3/](...continued)
policies. The *post hoc ergo propter hoc* logic of BCFM also ignores the impact of discrete things such as tax policy and changes in the economy, which in turn, also impacted on the value of stations.